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No. 750

# In the Supreme Court of the United States

OCTOBER TERM, 1958

FRANK DAVID, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. App. 1) is not yet reported. The opinion of the District Court (Pet. App. 1-8) is reported at 158 F. Supp. 269.

### JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1959 (Pet. App. 1) and the petition for a writ of certiorari was filed on March 4, 1959. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Jencks Act, the Government was required, after offering testimony of a Treasury agent, to disclose not only the agent's own report, but also various exhibits to the report which were not statements of the agent and which, in any event, were in large part made available to the defendant at appropriate times throughout the trial.

2. Whether the Government's proof satisfied the "starting point" and "likely source" requirements laid down by this Court in the net worth cases.

STATUTE INVOLVED

18 U. S. C. 3500 (Act of September 2, 1957, 71 Stat. 595) provides:

*Demands for production of statements and reports of witnesses*

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire con-

tents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * * *

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

## STATEMENT

On March 1, 1955, petitioner was indicted in the United States District Court for the Northern District of Ohio on two counts of wilful attempted evasion of income taxes for the years 1948 and 1949, in violation of Section 145(b) of the Internal Revenue Code of 1939. The amounts of net income and the tax liability thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 5a-6a):

| Year | Net Income | | Tax Liability | |
|---|---|---|---|---|
| | Reported | Corrected | Reported | Corrected |
| 1948 | $1,116 09 | $17,799 08 | $67 00 | $5,083 60 |
| 1949 (Loss) | (317 78) | 9,816 64 | 0 | 2,068 82 |
| Totals | $ 798 31 | $27,615 72 | $67 00 | $7,152 42 |

After a jury trial the petitioner was found guilty as charged. (R. 1a-2a, 6a.) On February 14, 1958, he was fined $2,500 and sentenced to one year in prison on each of the two counts, the sentences to run concurrently. (R. 612a.)

The evidence to support the verdict may be summarized as follows:

In 1933, the petitioner went into the restaurant business in Canton, Ohio, and was still engaged in that enterprise during the years in issue. (R. 404a-411a.) The petitioner's accountant maintained a set of books for him, recording the information furnished by the petitioner. (R. 11a, 317a-318a.) Each day the petitioner would take a reading from his cash register tape and record a figure on a daily sales sheet. These sheets, together with the tapes, would then be turned over periodically to the accountant for recording. (R. 219a, 246a, 296a, 417a, 562a-563a.) The books and records were in substantial agreement with the income tax returns filed by the petitioner. (R. 96a, 223a, 246a.)

A former employee of the petitioner testified that the petitioner had not reported all of his income to his accountant; that on various occasions in 1949 she had seen him tear off portions of his current cash register tapes and throw them in the waste basket to be burned; and that on one occasion, when she told the petitioner that she knew he was not reporting all of his sales, he told her to mind her own business. (R. 281a-282a, 289a-290a.)

The Government established the amounts of the unreported income by the net worth-expenditures method. There was introduced into evidence as Joint Exhibit 1 a stipulation between the parties consisting of a net

worth-expenditures statement for the years 1943 through 1949. Every item of the petitioner's net worth, except undeposited cash on hand, was therein agreed to, as were all expenditures except living expenses. (R. 7a-8a, 533a-537a.) Although the petitioner's reported income for the prosecution years (1948 and 1949) totalled only $798.31, his visible net worth increased by $28,873.51 during that period. (Govt. Exs. 6, 7; R. 534a-535a.)

The petitioner had never received any gifts or inheritances, and admitted before and at the trial that his only sources of income and net worth increases during the prosecution years were from his restaurant, rentals, and interest on a small savings account. (R. 218a, 414a-415a, 462a, 557a, 563a-567a.) The petitioner's undeposited cash on hand at the starting point, the only asset item not agreed upon in the stipulation, was arrived at in the following manner: The petitioner admitted to the Treasury agents in 1950 that the largest amount of cash he had ever had on hand was between $16,000 and $18,000; that in 1942 he had about $12,300; and that between 1942 and 1949 he increased it to perhaps $16,000 or $18,000. (R. 447a-448a, 559a.) This was consistent with his admission to a Treasury agent in the course of an earlier examination (in 1942) that he had $12,300 of cash at that time, which figure was accepted by the agent as correct. (R. 84a, 86a-87a, 117a-118a.) Although the petitioner's records reflected no cash on hand, his attorney submitted to the Internal Revenue Service in 1950 a net worth statement prepared by the petitioner's accountant (from information furnished by petitioner) which reflected cash on hand of $12,300 at the end of *each* year from 1943

through 1949. (R. 26a-29a, 107a, 118a, 328a-329a, 545a.) A net worth statement filed by the petitioner with a bank showed that as of September 30, 1948, his cash on hand totalled $18,634.22. (R. 118a.) Analysis of petitioner's known receipts and disbursements disclosed that between 1942 and the end of 1947 he could have accumulated approximately $5,200 of cash in addition to the $12,300 he admitted having had at the end of 1942. Accordingly, his undeposited cash as of December 31, 1947, the beginning of the prosecution years, was estimated at $17,500. (R. 118a-122a.)[1]

ARGUMENT

1. The petitioner contends (Pet. 15-23) that, when Special Agent Keller had completed his direct testimony as a Government witness, the petitioner was entitled, for cross-examination purposes, not only to Keller's investigation report, but to all of the documentary evidence which accompanied that report when it was transmitted to the Department of Justice for prosecution. The contention is without merit. The petitioner relies upon the Jencks Act (18 U.S.C. 3500) and *Jencks* v. *United States*, 353 U.S. 657.

18 U.S.C. 3500, *supra*, pp. 2-3, provides that at the conclusion of the direct examination of a Government witness the court shall, on motion of the defendant, order the production of any relevant "statement (as

[1] In August, 1950, petitioner told the Treasury agents that he then had only $200 of cash on hand, which was used in his business. He claimed that he had only one safe deposit box, but the agents learned of the existence of another one and, after securing petitioner's permission to inventory its contents, counted $15,957 in currency there in September, 1950. (R. 98a-100a.) Petitioner explained that he had forgotten about the box containing the currency. (R. 220a.)

hereinafter defined) of the witness in the possession of the United States * * *." In compliance with the statute, the court in this case did order the production of Agent Keller's investigative report, which was turned over (with minor excisions, of which the petitioner makes no point) to defense counsel for use in cross-examining Keller. (R. 147a-150a.) The petitioner's complaint is that the Government should also have been required to produce the exhibits attached to Keller's report. An examination of these exhibits demonstrates that not a single one of them was a statement of the witness.[2] Instead they consisted of reports, tax returns, or statements by others, including the petitioner, referred to by the agent in his report. Plainly these documents do not constitute "statement[s] * * * of the witness," as defined in Subsection (e) of the statute; *supra*, p. 3.

Moreover, nine of the fourteen exhibits in question had previously been introduced into evidence at the trial; and three of the remaining five, consisting of reports or statements of other witnesses, were produced when such other witnesses subsequently testified. Ex-

[2] Exhibit No. A. Copy of Deputy Collector Dale Kauffman's report in re Frank David; No. B. Form 899, Certificate of Assessments and Payments; No. C. Photostatic copies of Frank David's 1944 return; No. D. Photostatic copies of Frank David's 1945 return; No. E. Photostatic copies of Frank David's 1946 return; No. F. Photostatic copies of Frank David's 1947 return; No. G. Photostatic copies of Frank David's 1948 return; No. H. Photostatic copies of Frank David's 1949 return; No. I. Sworn statement of Frank David; No. J. Sworn Statement of Simon A. Spilker; No. K. Financial statements of Frank David as of December 31, 1943, to 1949, inclusive, as prepared by his accountant Simon A. Spilker; No. L. Copies of net worth statements prepared by agents of the Bureau of Internal Revenue in prior examinations of the taxpayer's return; No. M. Sworn statement of Mrs. Mae Wise; No. N. Chronological list of conferences with taxpayer.

hibit No. A, a copy of the report of Deputy Collector Kauffmann, was produced at the proper time, *viz.*, at the conclusion of Kauffmann's direct testimony. (R. 252a.) Exhibit No. B, a certificate of the petitioner's income tax assessments and payments, had already been introduced as Government Exhibit 8. Exhibits C through H, copies of tax returns filed by petitioner, had already been introduced as Government Exhibits 2 through 7. Exhibit I, a sworn statement of the petitioner, was later introduced into evidence as Government Exhibit 21. (R. 519a-521a.) Exhibit J, a statement made by the petitioner's accountant, had already been produced at the proper time, *viz.*, at the conclusion of that witness' direct testimony, and had been received in evidence without objection. (R. 59a, 65a-66a, 538a-544a.) Exhibit K, financial statements of petitioner, prepared by his accountant and submitted to the Internal Revenue Service by the petitioner's attorney, had already been introduced as Government Exhibit 10. (R. 26a.) Exhibit M, a statement made to the Treasury agents by a former employee of the petitioner, was produced at the proper time—at the conclusion of the direct examination of that witness. (R. 288a.) There remain for discussion only Exhibits L and N.

Exhibit L is described as "Copies of net worth statements prepared by agents of the Bureau of Internal Revenue in prior examinations of the tax-payer's return". (Pet. 19.) This refers to statements of the petitioner's net worth as of the end of each year from 1933 through 1941, prepared by Revenue Agent McCammon in 1942 (R. 80a), and to such statements as of

the end of the years 1941 through 1943, prepared by another agent in 1945 in the course of an investigation of petitioner's 1943 return (R. 591a). The petitioner's counsel was already in possession of the latter report (R. 580a-591a) and if he desired Agent McCammon's report for the still earlier examination he did not say so. McCammon had already testified at some length about his examination for those years (R. 80a-87a) and defense counsel, instead of asking for a copy of his report or questioning him about the examination, confined his cross-examination to a group of questions relating merely to the amount of the personal exemption provided by the Internal Revenue Code for certain years in the 1930's (R. 88a-92a).

As for Exhibit N, that is described (Pet. 19) as a "Chronological list of conferences with taxpayer". That list was not produced at the trial or ever requested by the defense,[3] nor does the petitioner even now make any effort to explain how it could conceivably have aided him in impeaching Keller or accomplishing any other purpose.

It is clear that of the fourteen exhibits in question, twelve were either introduced into evidence or produced for inspection by the defense; that the defense already had a part of Exhibit L (net worth statements of the petitioner for 1941 through 1943) and could easily have obtained the rest of it upon proper request; and

[3] It should be noted that at the trial defense counsel placed primary emphasis upon obtaining a copy of petitioner's own statement. (Govt. Ex. 21; R. 135a-146a.) This was presented to petitioner while he was on the witness stand. He was permitted to read it in its entirety, and then denied that he recognized the statement at all. He did recall, however, having conferred with the agents at about that time. (R. 479a.)

that the defense never asked for Exhibit N, the "Chronological list of conferences with taxpayer." Whatever may be said of the petitioner's abstract legal argument (that when a Treasury agent testifies as to the results of his investigation the Government must, on defendant's request, produce all the documentary proof which accompanied his report) no such question is presented on this record. What we have said heretofore applies equally to petitioner's reliance upon *Jencks* v. *United States*, 353 U.S. 657 (which relates only to statements or reports made by a Government witness).

2. Equally without merit is the argument (Pet. 23-30) that the proof failed to satisfy the requirements relating to (1) "likely source" of taxable income and (2) net worth starting point, as laid down by this Court in *Holland* v. *United States*, 348 U.S. 121, and *United States* v. *Massei*, 355 U.S. 595.

(1) There was no source problem in this case. The petitioner admitted at the trial, as he had to the agents during the investigation, that he had received no gifts or inheritances and that all of his net worth increases arose from income from his restaurant business, rental income, and interest on a small savings account. (*Supra*, p. 5.)

(2) The proof that the petitioner's starting point net worth, as reconstructed by the Government, included all his assets as of December 31, 1947, was ample. There was evidence that between 1923 and 1933 the petitioner was a factory worker (R. 403a); that between 1934 and 1936 he filed no income tax returns; that between 1937 and 1943 he reported only $18,913.81

in income (R. 82a, 584a, 586a.); that he had stated to the agents in 1942 and again in 1950 that he had $12,300 of cash on hand in 1942; that his attorney had submitted to the agents a statement prepared by the petitioner's accountant, which disclosed cash on hand of $12,300 at the close of each year from 1943 through 1949; and that in 1950 the petitioner told the agents that he had never had more than $16,000 to $18,000 of cash on hand. (*Supra*, pp. 5-6.) These admissions were amply corroborated by (1) the testimony of a former employee of the petitioner that in 1949 she saw him tearing off parts of his cash register tapes, from which sales were recorded in the books (*Smith* v. *United States*, 348 U.S. 147, 159); (2) the financial statement filed with a bank in 1948, wherein the petitioner stated his undeposited cash at $18,634.22; and (3) the exhaustive receipts and expenditures analysis conducted by Treasury agents. The Government's estimate of $17,500 cash on hand at the end of 1947 was based firmly on the evidence, and all the net worth items except cash on hand were covered by the stipulation. (*Supra*, pp. 4-6.)

The petitioner's argument that he was not properly given credit for unreported income determined by the Internal Revenue Service for earlier years (Pet. 23-27) is plainly without substance. The determinations for the years 1944 through 1947 were made on the net worth method, and hence automatically gave the petitioner "credit" in his net worth for the unreported income. As for prior years, the petitioner was, in effect, also given credit for the unreported income

earned in years before 1944, because such income was reflected in his net worth increases and expenditures.[4]

## CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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APRIL, 1959.

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[4] The proof showed that for the years 1934 through 1943 the petitioner's net income was determined by the Internal Revenue Service as $82,053.17, involving a total income tax liability of $8,674.86. (R. 82a-83a, 584a-589a.) The petitioner's net worth as of December 31, 1943 (the real beginning point of Agent Keller's computations), was fixed at $60,471.74 ($48,171.74 of visible assets plus $12,300 cash on hand). (R. 117a-119a, 536a-537a.) Hence, the opening net worth with which the petitioner was credited by the Government was equal to his total income as corrected, after taxes, less some $1,300 per year for personal and living expenses. Moreover, even if this were not the case, no good reason appears for ignoring all the proof summarized in the preceding paragraph and indulging in the assumption that petitioner may have secreted more cash (from unreported income) than he claimed prior to trial.

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